IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Phyllis Howard	:	**CIVIL ACTION**
	:	
vs.	:	
	:	
Kenneth S. Apfel,[1]	:	
Commissioner,	:	
Social Security Administration	:	**NO. 95-6906**

M E M O R A N D U M

DUBOIS, J. **JANUARY 20, 1998**

Plaintiff, Phyllis Howard, brought this action, pursuant to 42 U.S.C. § 405(g), appealing the denial of her claim for supplemental security income ("SSI") benefits[2] by defendant, the Commissioner of the Social Security Administration. Currently before the Court are the parties' motions for summary judgment. For the reasons set forth below, the Court will approve and adopt the sections of the Magistrate Judge's Report and Recommendation addressing the credibility of the physicians' work-related physical activity reports and the credibility of the plaintiff's testimony with respect to pain and physical limitations, deny defendant's Motion for Summary Judgment, and deny plaintiff's Motion for Summary

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[1]On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Mr. Apfel is substituted for Shirley Chater, a prior Commissioner, as defendant. See also 42 U.S.C. § 405(g) (1997) ("Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.").

[2]42 U.S.C. § 1383(c)(1)(B)(3) (1997) provides that decisions of the Commissioner with regard to SSI benefits shall be subject to judicial review as provided in 42 U.S.C. § 405(g).

Judgment. Plaintiff's alternative request for relief will be granted; the decision of Administrative Law Judge Hazel C. Strauss ("ALJ") will be vacated and the matter will be remanded to defendant for further proceedings consistent with this Memorandum.

I. Factual and Procedural Background

On March 2, 1990, plaintiff was admitted to the Hospital of the University of Pennsylvania ("HUP") in Philadelphia with spinal injuries after being found unconscious on a Philadelphia street. An MRI showed a central disc herniation. On March 12, 1990, plaintiff was transferred to Magee Rehabilitation Hospital ("Magee"), where she remained for nearly two months and underwent physical and occupational therapy. In July, 1990, plaintiff returned to HUP and underwent a laminectomy and foraminotomy for a herniated cervical disc. After the surgery, she was examined periodically by both a neurologist and a psychiatrist.

Plaintiff applied for SSI benefits three times between March 1990 and January 1993. Plaintiff's first application was filed on March 21, 1990 and denied on June 11, 1990. She applied again on July 25, 1991, and that application was denied on October 29, 1991. Plaintiff applied for benefits a third time on January 28, 1993. That application, which is at issue in this litigation, was denied on May 10, 1993.

In her application for SSI benefits, plaintiff claimed that she was unable to work because of pain and disabilities caused by her spinal injury. Plaintiff is left-handed and contended she

could no longer write legibly or hold objects in her left hand for any length of time. Medical reports submitted as part of plaintiff's application disclosed, inter alia, that she could not lift more than ten pounds, could not stand or walk for prolonged periods of time, and occasionally lost her balance. See Exh. 20 and Exh. 30.

Plaintiff is a fifty-five year old woman who left high school after the tenth grade. Prior to her injury, plaintiff had been unemployed for nearly twenty years. Her most recent employment, which ended in 1971, was repairing venetian blinds.

After her third application for SSI benefits was denied, plaintiff requested reconsideration by the Social Security Administration. On reconsideration, the claim was again denied by notice dated July 30, 1993. Plaintiff appealed the denial and requested a hearing before an administrative law judge. A hearing was held before the ALJ on September 22, 1994.

At the hearing, the ALJ heard testimony from plaintiff and a vocational expert, Dr. William O'Toole. The ALJ also considered reports from Dr. Keith Robinson, plaintiff's physician, and Dr. Pushpa Thakarar, a consulting examiner with the Pennsylvania Bureau of Disability Determinations, as well as other medical evidence.[3]

On November 4, 1994, the ALJ denied plaintiff's SSI claim, finding that she was not disabled and therefore not entitled to SSI

[3] Other documents considered by the ALJ include plaintiff's prior applications for supplemental security income, plaintiff's Daily Activities Questionnaire, and plaintiff's discharge summaries from HUP and Magee. See List of Exhibits, Rec. at 1.

benefits. In denying plaintiff's claim, the ALJ rejected the work-related physical activity reports of Drs. Thakarar and Robinson because they were not consistent with the doctors' narrative descriptions of plaintiff's condition and other medical evidence. Similarly, the ALJ found that plaintiff's testimony about her symptoms and pain was "not supported by the medical evidence and is not totally credible." ALJ Finding No. 3.

The ALJ concluded that although plaintiff was not capable of performing the full range of light work[4] because she was unable to lift twenty pounds, ALJ Finding No. 9, she could "perform the physical exertion requirements of work except for prolonged walking, prolonged standing, lifting and carrying more than 10 to 15 pounds." ALJ Finding No. 4. Relying on the testimony of the vocational expert, the ALJ found that there were employment opportunities available to plaintiff including the positions of counter clerk, furniture retail clerk, school crossing guard, and school bus monitor. ALJ Decision at 8.

On September 1, 1995, the Appeals Council of the Social

[4] Light work is defined as work which involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities." 20 C.F.R. § 404.1567(b) (1997). In addition "the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time." Social Security Ruling 83-10, 1983 WL 31251 at *6 (1983).

Security Administration denied plaintiff's request for review of the ALJ's decision, thereby making the decision of the ALJ a final action by defendant. Plaintiff initiated this action on November 2, 1995. On January 16, 1997, plaintiff filed a Motion for Summary Judgment; defendant filed a Motion for Summary Judgment on March 13, 1997.

The case was submitted to United States Magistrate Diane M. Welsh for a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Welsh issued a Report and Recommendation on May 9, 1997 in which she found that the ALJ's decision was supported by substantial evidence[5] and should be affirmed. Judge Welsh recommended that defendant's Motion for Summary Judgment be granted and that plaintiff's Motion for Summary Judgment be denied. Plaintiff filed Objections to the Magistrate's Report and Recommendations on May 27, 1997.

II. Standard of Review

The Report and Recommendation of Judge Welsh are subject to de novo review by the Court, as they address dispositive issues. See, 42 U.S.C. 636(b)(1)(1993) and Federal Rule of Civil Procedure 72(b) (1997).

The Court reviews the decision of defendant to determine whether it is supported by "substantial evidence." See 42 U.S.C. 405(g) (1997). This standard applies both to findings of fact and

[5] See infra, Section II for a discussion of the "substantial evidence" standard.

credibility. See, e.g., Van Horn v. Schweiker, 717 F.2d 871, 873-74 (3d Cir. 1983). The Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) quoting Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938).

The Third Circuit has expanded on that definition when there is contradictory evidence:

> A single piece of evidence will not satisfy the substantiality test if the Secretary ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence -- particularly certain types of evidence (e.g. that offered by treating physicians) -- or if it really constitutes not evidence but mere conclusion. . . . The search for substantial evidence is thus a qualitative exercise without which our review of social security disability cases ceases to be merely deferential and becomes instead a sham.
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> Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983).

Under this standard, an ALJ's opinion must be "as comprehensive and analytical as feasible and, where appropriate, should include a statement of subordinate factual foundations on which ultimate factual conclusions are based." Cotter v. Harris, 642 F.2d 700, 705 (3d Cir.) reh'g denied 650 F.2d 481 (3d Cir. 1981) quoting Baerga v. Richardson, 500 F.2d 309, 312 (3d Cir. 1974) cert. denied 420 U.S. 931, 95 S.Ct. 1133 (1975). Usually a "sentence or short paragraph" in support of each finding is sufficient. Cotter, 650 F.2d at 482.

III. Analysis

A. The ALJ's Rejection of the Work-Related Physical Activity Reports

The ALJ rejected the physical activity reports from Drs. Robinson and Thakarar covering plaintiff's ability to perform work-related physical activities. ALJ Dec. at 4 and 6. Both doctors concluded, inter alia, in these reports that plaintiff was significantly limited in her ability to stand, sit and lift. Id. The ALJ determined that these reports conflicted with the physicians' narrative reports about plaintiff's condition and with other evidence in the record. Id. She therefore found the doctors' narrative reports credible but gave the physical activity reports no weight in her decision. Id.

A doctor's opinion can be rejected by an ALJ if contradictory medical evidence is presented, as it was in this case. Frankenfield v. Bowen, 861 F.2d 405, 408 (3d Cir. 1988). See also Adorno v. Shalala, 40 F.3d 43, 47-48 (3d Cir. 1988). The ALJ properly supported her rejection of the physical activity reports of Drs. Robinson and Thakarar by reference to substantial contrary medical evidence. ALJ Dec. at 3-6. She pointed to particular instances in which the physical activity reports conflicted with the doctors' narrative reports about plaintiff's strength, stamina, and activities. Id. In addition, the ALJ explained her reasons for only crediting some of the information provided by the physicians. Id.

In her analysis of this issue, the ALJ inferred that plaintiff

was not disabled because she could cook and shop: "[s]ince the claimant is able to ambulate independently and is able to take public transportation and is able to cook and shop . . . there is no reason why the claimant could not stand and walk six hours . . . ." The inference that plaintiff was not disabled - based solely on plaintiff's ability to cook and to shop - is entirely too speculative to be sustainable. On that issue, the Third Circuit has held that shopping for necessities and engaging in activities such as hunting on two occasions is not a negation of disability. See Smith v. Califano, 637 F.2d 968, 971 (3d Cir. 1981). Accordingly, the Court will disregard this improper inference in determining whether there is substantial evidence to support the ALJ's finding that the physical activity reports were not credible. After having done so, the Court concludes that there is such substantial evidence. Accordingly, the ALJ's rejection of the physical activity reports was entirely proper.

B. The ALJ's Findings On Plaintiff's Credibility

While an ALJ is required to seriously consider a claimant's testimony about the "intensity, persistence, and limiting effects" of her symptoms, 20 C.F.R. § 404.1529(c)(4) (1997); See also Serody v. Chater, 901 F. Supp. 925, 930 (E.D. Pa. 1995), she is also "empowered to evaluate the credibility of witnesses." Van Horn, 717 F.2d at 873. An ALJ can reject the testimony of a claimant, if the ALJ provides substantial evidence for her decision. Mason v. Shalala, 994 F.2d 1058, 1067-68 (3d Cir. 1993);

Green v. Schweiker, 749 F.2d 1066, 1068 (3d Cir. 1984).

The ALJ rejected some of plaintiff's testimony about her pain and impairments because it conflicted with medical reports and other testimony of plaintiff. ALJ Dec. at 6-7. In doing so, the ALJ acknowledged that she was required to seriously consider subjective testimony about pain, and she explained her reasons for rejecting some of plaintiff's testimony by pointing to plaintiff's contradictory testimony and the credible contrary medical evidence.[6] Accordingly, the Court concludes that the ALJ's findings as to the credibility of plaintiff's testimony concerning pain and impairments are supported by substantial evidence.

C. The ALJ's Use of Residual Functioning Capacity Tables

Social Security regulations require the use of residual functioning capacity tables ("the grids") to determine whether a claimant is disabled if the claimant's physical abilities exactly match the criteria on the grid. 20 C.F.R. § 404.1569; § 404 Subpt. P, App. 2, § 200.00(d)(1997). The grids must be used if a claimant can perform all of the duties at a particular work level, i.e., sedentary work, light work, medium work, heavy work, or very heavy

[6] For example, the ALJ stated that: "Her testimony as to her lack of feeling in her left extremities and her inability to lift and hold things in her right hand is not credible because it is contrary to the medical reports which indicate that the claimant has generally good to full strength in the right upper and lower extremities." ALJ Dec. at 7.

work.[7] If a claimant's physical ability varies from the work level requirements, as it does in this case, the ALJ may use the grids as a "framework" in conjunction with other evidence to determine whether a claimant is disabled. Usually, a vocational expert is called to testify as to whether employment is available, given the claimant's limitations. 20 C.F.R. § 404 Pt. P, App. 2 § 200.00(e)(2); 20 C.F.R. § 404.1566(e)(1997); Jesurum v. Secretary of Health and Human Serv., 48 F.3d 114, 121 (3d Cir. 1995).

In this instance, the ALJ used the grids as a "framework," ALJ Finding No. 9, in conjunction with the testimony of the vocational expert, ALJ Decision at 7-8, in analyzing whether the plaintiff was disabled. However, for the reasons which follow, the ALJ's reliance on the vocational expert's testimony with respect to available employment was misplaced.

D. The ALJ's Use of the Vocational Expert's Testimony

In her Findings, the ALJ contradicted herself concerning plaintiff's physical limitations. She found that plaintiff could work "except for prolonged walking, prolonged standing, lifting and carrying more than ten to fifteen pounds." ALJ Finding No. 4. She then went on to find that plaintiff "does not have the residual functional capacity to perform the full range of light work because of inability to do the lifting requirement of 20 pounds." ALJ Finding No. 9. Those two findings are inconsistent because the

[7] See 20 C.F.R. Pt. 404, Subpt. P, App. 2 §201.00 - 204.00 for definitions of the work levels.

full range of light work requires, inter alia, "standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday,"[8] and the ALJ said nothing concerning plaintiff's inability to stand or walk for a long period of time in her finding with respect to plaintiff's ability to perform light work. Using the ALJ's own findings as a guide, plaintiff could not perform the full range of light work for reasons other than the weight lifting requirements. This is particularly significant in this case because the jobs recommended for plaintiff by the vocational expert involved standing or walking, not lifting.

1. The ALJ's Hypothetical Questions to the Vocational Expert Were Improper

In addition to contradicting herself, the ALJ erred again by not posing questions to the vocational expert which reflected either of her conclusions about plaintiff's physical limitations -- that plaintiff could not walk or stand for a prolonged period of time, and that plaintiff could not lift more than ten or fifteen pounds.

At the hearing, the ALJ asked the vocational expert about employment opportunities for plaintiff given a range of different criteria. She first asked whether employment was available if the plaintiff's testimony on her pain and impairments was fully accepted. The vocational expert responded that, under that testimony of plaintiff, employment was not available. Rec. at 65.

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[8] Social Security Ruling 83-10, 1983 WL 31251 at *6 (1983). See supra, note 4 for the complete definition of light work.

The ALJ then asked if jobs were available assuming that plaintiff could perform light work,[9] "limited by a lack of functioning of her left hand, and [if she] has to walk slowly because of a problem with her left side." Rec. at 66. In response, the vocational expert testified that with those physical restrictions, plaintiff could be employed as a counter clerk, furniture rental clerk, school crossing guard, or school bus monitor. Rec. at 66. The ALJ then asked whether postural limitations -- the inability to climb, balance, stoop, crouch, and crawl -- would affect plaintiff's job possibilities. The vocational expert replied that a furniture rental clerk needed to be able to occasionally stoop and crawl, Rec. at 73, but that the ability to perform the other jobs was not affected by such postural limitations.

The ALJ also inquired whether plaintiff could perform the four jobs, given the further limitations which Dr. Robinson had diagnosed -- difficulty in reaching, handling, and dexterity, Exh. 30. The vocational expert responded that those limitations would not affect plaintiff's performance in those jobs. Rec. at 71 - 73. In response to a question from plaintiff's attorney, the ALJ clarified that she was not referring to Dr. Robinson's recommended limitation on standing.[10]

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[9] See supra, note 4 for a definition of light work.

[10] "Rep: When you discuss the other physical limitations on Dr. Robinson's [work-related physical activity report], I assume you were referring to items on the second page. . . . Rather than his statements that she should stand for less than two hours."
ALJ: That's right." Rec. at 71.

2. The Vocational Expert's Testimony About the "Sit/Stand Option"

The ALJ did inquire about limitations on standing, but only in reference to one position -- counter clerk. The vocational expert responded that such information was not available but informally hypothesized, based only on his own observations, that perhaps fifty percent of employers would allow a person to sometimes sit down during the work day. Rec. at 69-70.[11] The ALJ did not ask the vocational expert about "the sit option" in regard to any other job. With respect to the position of school crossing guard, she asked whether it was necessary to stand for eight hours; the vocational expert replied that the job required standing for two shifts of two to three hours each. Rec. at 72-73.

3. The Vocational Expert's Testimony Does Not Constitute Substantial Evidence for the ALJ's Findings

To support her finding that plaintiff was not entitled to SSI benefits, the ALJ also had to find that plaintiff had "the capacity to perform specific jobs that exist in the national economy." Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979). The ALJ did not find specifically that plaintiff could perform the four jobs described by the vocational expert, but she did describe them in her opinion. ALJ Dec. at 8. By finding that plaintiff was not

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[11] "Q: Is there any way you can, from your experience, to determine how many such jobs would exist where the employer allows the employee that option [of only standing when necessary]?

A: At best, 50-50 kind of split, and that's just a real informal sense based on observations primarily." Rec. at 70.

entitled to SSI benefits, the ALJ implicitly concluded that plaintiff could perform the duties required in those four positions.

However, as the residual functioning capacity grids were only available as a framework, the testimony of the vocational expert or other evidence was necessary to support the ALJ's conclusions regarding employment opportunities for plaintiff. Podedworny v. Harris, 745 F.2d 210, 218 (3d Cir. 1984). A vocational expert's testimony can only provide "substantial evidence" for an ALJ's decision on available employment if the hypothetical questions posed to the expert accurately reflect the physical and exertional limitations of the claimant. Podedworny, 745 F.2d at 218. See also Allen v. Sullivan, 977 F.2d 385, 390 (7th Cir. 1992).

In this case, the ALJ's hypothetical questions did not reflect her findings about the plaintiff's physical limitations. Except with respect to the position of counter clerk, the ALJ never asked the vocational expert to consider a person who could not stand or walk for a prolonged period of time, although she found that plaintiff had such limitations.[12]

Furthermore, the vocational expert's testimony about the ability to sit down as a counter clerk does not provide substantial

[12] The ALJ rejected Dr. Robinson's report about plaintiff's postural limitations, ALJ Dec. at 5-6, and rejected plaintiff's testimony about her pain and impairments, ALJ Dec. at 6-7. As the Court has found that those rejections were supported by substantial evidence, the ALJ's questions to the vocational expert which referenced Dr. Robinson's report and plaintiff's testimony are not relevant to this Memorandum.

evidence for the ALJ's conclusion. The vocational expert only informally hypothesized about whether sitting down was possible and told the ALJ that such information was unavailable. Nonetheless, in her opinion, the ALJ relied on the testimony about the "sit/stand option" and cited the other jobs as employment possibilities for plaintiff although there was no testimony about whether a person could occasionally sit down and perform her duties in those jobs. ALJ Dec. at 8.

Accordingly, the Court concludes that the ALJ's finding that plaintiff is not entitled to SSI benefits is not supported by substantial evidence because it was not shown that employment is available to plaintiff, given her physical limitations. Therefore, the matter will be remanded to defendant to more fully develop the record.

IV. Plaintiff's Motion for Summary Judgment

In her Motion for Summary Judgment, plaintiff asked the Court to order an award of benefits on the ground that the ALJ's findings establish that plaintiff can only perform sedentary work. If plaintiff could only perform sedentary work, the Social Security regulations would mandate a finding of disability, given plaintiff's age, limited education, and lack of previous work experience. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.09. However, the Record does not establish that plaintiff can perform only sedentary work. Therefore, the Court will deny plaintiff's Motion for Summary Judgment and grant plaintiff's alternative

request for relief and remand the case for further proceedings to more fully develop the record.

V. Conclusion

The ALJ provided substantial evidence to support her findings that the physicians' work-related physical activity reports and plaintiff's testimony regarding pain and physical limitations were not credible. However, the ALJ's determination that plaintiff was not disabled -- based on the testimony of the vocational expert about available jobs for plaintiff -- was not supported by substantial evidence. Likewise, the Record in this case is insufficient to enable the Court to conclude that plaintiff is disabled and therefore entitled to SSI benefits. Accordingly, for the reasons set forth in this Memorandum, the matter will be remanded to defendant for further proceedings consistent with this Memorandum.

An appropriate Order follows.